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Consideration of issues in the area of insolvency law

Finalization and adoption of a model law on cross-border recognition and enforcement of insolvency-related judgments and its guide to enactment

Compilation of comments on the draft model law on the recognition and enforcement of insolvency-related judgments as contained in an annex to the report of Working Group V (Insolvency Law) on the work of its fifty-second session (A/CN.9/931)

Note by the Secretariat

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I. Introduction

1. At its forty-seventh session, in 2014, the Commission mandated its Working Group V (Insolvency Law) to develop a model law or model legislative provisions providing for the recognition and enforcement of insolvency-related judgments.[1] In pursuance of that mandate, the Working Group worked to develop a draft model law from its forty-sixth (Vienna, 15–19 December 2014) to its fifty-third session (New York, 7–11 May 2018). At its fifty-second session (Vienna, 18–22 December 2017), the Working Group requested the Secretariat to transmit the revised text of the draft model law (as set forth in the annex to the report of that session (A/CN.9/931)) to Member States for comment, before referring the draft model law to the Commission for consideration at its fifty-first session, in 2018.

2. In February 2018, Governments and invited international organizations were invited to submit comments on the draft model law on the recognition and enforcement of insolvency-related judgments, as approved by the Working Group at its fifty-second session.

3. The present document reproduces, in chronological order, comments on the draft model law as received by the Secretariat, with formatting changes.

II. Compilation of comments

A. Governments

1. Thailand

[Original: English]
[11 April 2018]

1. Article 2(c) "Judgment"

The definition should add the following sentence at the end of the current meaning: A criminal case judgment stemming from an insolvency case is not a judgment under this Law. This exclusion should be written explicitly as a model law provision, not simply in the Guide to Enactment. This statement will reassure the United Nations members especially the parliament of each country, when deliberating about this, that the Law will not interfere/go into the area of criminal case.

2. Article 15 Severability

Second line: should change from "shall be granted" to "may be granted". For this article, the Law needs to provide flexibility to the local court in recognizing the judgment.

2. Mexico

[Original: Spanish]
[16 April 2018]

Article 9 bis, paragraph 1

- The note by the Secretariat on the draft model law (A/CN.9/WG.V/WP.150) should be taken into account, particularly paragraph 14 on refusal of recognition or enforcement of the judgment, and paragraph 15 on the provision of security. In addition, a definition should be provided of "ordinary review", because the nature of such review varies from State to State.

[1] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 17* (A/69/17), para. 155.

Article 12, subparagraph (d)

- It is proposed to return to the previous wording, namely: "(d) Recognition and enforcement is sought from or arises by way of defence or as an incidental question before a court referred to in article 4", because enforcement may also arise as an incidental question.

3. Bolivarian Republic of Venezuela

[Original: Spanish]
[16 April 2018]

1. Background

The Secretariat of the United Nations, through note LA/TL 133 (15) CU2018/44/OLA/ITLD of 7 February 2018, invited the Permanent Mission of the Bolivarian Republic of Venezuela to the United Nations to submit comments on the draft model law on the recognition and enforcement of insolvency-related judgments, as approved by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL).

2. Legal commentary

The scope of application of the draft model law comprises the cross-border recognition and enforcement of insolvency-related judgments, as reflected in its title and article 1.

In that regard, it is first necessary to consider what is meant by cross-border insolvency. To do so, we must examine the definition provided by UNCITRAL, which establishes that cross-border insolvency is essentially an economic phenomenon that occurs where a debtor becomes insolvent and has assets in more than one State, or where some of the creditors of the debtor are not from the State in which the insolvency proceedings have been instituted.

In the light of the foregoing, it appears that the definition of cross-border insolvency encompasses two situations involving foreign legal systems, namely:

1. Where the insolvent debtor has assets in more than one State;
2. Where some of the creditors of the insolvent debtor are not nationals of the State in which the debtor is declared insolvent.

It is therefore necessary to examine cross-border insolvency in the light of the provisions of the Act on Private International Law of the Bolivarian Republic of Venezuela, which establishes that the creation, content and extension of rights over assets are governed by the law of the place where the asset or assets are located, a principle that is also reflected in the Commercial Code. In addition, the Act does not establish any specific rules in relation to insolvency, which is why it is necessary to refer to the provisions of the Commercial Code, which governs the insolvency regime through the legal concepts of arrears and bankruptcy.

In that regard, it should be noted that arrears is a commercial law concept that covers situations in which a trader, finding itself temporarily unable to repay outstanding debts, requests the competent commercial court to declare it in arrears in order to enable the voluntary liquidation of its business, within a reasonable time frame not exceeding 12 months, and undertakes not to carry out any business other than simple retail business while its request is being considered. The declaration of arrears requires that the assets of the company should exceed its liabilities.

Furthermore, the Commercial Code of the Bolivarian Republic of Venezuela provides that any trader that is not in arrears but is unable to repay its outstanding debts may initiate bankruptcy proceedings.

Thus, bankruptcy is an economic term that refers to a trader whose assets are insufficient to meet its debts. Accordingly, laws in the collective interest have hitherto

regulated such situations and established substantive rules whose purpose is to determine the scope of the concept of bankruptcy in domestic legislation, as well as procedural rules that regulate the proceedings.

It follows from the foregoing that domestic legislation governs insolvency, and in that regard it is important to make a number of comments regarding jurisdiction to determine bankruptcy in the case of the Bolivarian Republic of Venezuela, given that the outcome of bankruptcy proceedings has consequences erga omnes, which is a derogation from the principle according to which a judgment is considered to have the force of res judicata only with respect to the parties: the principle of "relativity of res judicata".

Thus, in the Bolivarian Republic of Venezuela, as a general rule, the court that has jurisdiction over a bankruptcy proceeding is the court of the place of business of the bankrupt party, in other words, its principal place of business and interests. It is important to note that, accordingly, legal opinion has tended to favour the principle of "unity of bankruptcy", which means that bankruptcy proceedings may be initiated only in the place of business of the trader. Therefore, in cases involving multiple places of business, the main place of business shall be the registered office, or the place where the headquarters is located.

However, in cases in which a trader is declared bankrupt by a foreign court and has a branch in the Bolivarian Republic of Venezuela, the court's decision must be subject to an exequatur procedure in order to take effect.

To a certain extent, the previous statement conflicts with legal opinion and international legislation insofar as they defend the absolute unity of bankruptcy, which entails the extraterritorial application of bankruptcy judgments without an exequatur.

However, the position of the Venezuelan legislator is based on the principle of effective judicial protection, enshrined in article 26 of the Constitution of the Bolivarian Republic of Venezuela, which provides for judicial guarantees, also known as the right to effective judicial protection, which has been defined as the right of every person to seek the assistance of the organs responsible for the administration of justice so that their claims can be considered through proceedings that ensure basic guarantees. Judicial guarantees therefore constitute the right to access justice through proceedings conducted by an organ in order to obtain a decision issued in accordance with the law.

Effective judicial protection is a constitutional procedural guarantee that must be in place from the moment a person accesses the judicial system until the judgment issued in the case concerned is definitively enforced. In other words, once access to justice is guaranteed, every other constitutional guarantee and principle that shapes the proceedings, such as due process, expeditiousness, defence and cost-free legal assistance must be protected on the basis that the undermining of any of those guarantees would violate the principle of effective judicial protection.

Therefore, the right to effective judicial protection is intended to ensure an effective mechanism that enables individuals to redress a situation in which their rights have been violated, and comprises the right to access; the right to cost-free legal assistance; the right to an appropriate, coherent and duly grounded judgment that is issued without undue delay; interim protection; and guaranteed enforcement of the sentence.

Furthermore, article 53 of the Act on Private International Law establishes that foreign judgments shall have effect in the Bolivarian Republic of Venezuela provided that, inter alia, they do not concern rights in rem over immovable property located in the Bolivarian Republic of Venezuela, and that the Bolivarian Republic of Venezuela has not been deprived of any exclusive jurisdiction it may have over the matter; and that the courts of the sentencing State have jurisdiction to hear the case, in accordance with the general principles governing jurisdiction that are recognized in national legislation.

3. Final consideration

In the light of the above, the Office of the Legal Adviser is of the view that, taking into account the different legal systems, the scope of application of the model law will not achieve the effectiveness sought, as the recognition and enforcement of foreign judgments necessarily involves domestic proceedings, for which an exequatur is required in most States.

Thus, it is believed that a domestic law would be unable to regulate foreign judicial cooperation mechanisms effectively given that its scope of application would not enable it to be enforcemable or effective against another State.

4. Colombia

[Original: Spanish]
[24 April 2018]

1. CONTENT OF THE DRAFT LAW

The draft model law on the recognition and enforcement of insolvency-related foreign judgments is the result of work carried out by Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law with the aim of achieving the application, in each of the States parties, of judgments issued as a result of a judicial or administrative decision in the context of an insolvency proceeding.

The draft model law contains a preamble and 15 articles.

It should first be noted that in accordance with article 3 of the draft model law, the law "shall not apply to a judgment where there is a treaty in force concerning the recognition or enforcement of civil and commercial judgments (whether concluded before or after this Law comes into force), and that treaty applies to the judgment".

In that regard, and having examined the constitutionality rulings of the court in respect of international treaties and conventions signed by Colombia, we have not found any multilateral documents on that subject.

2. COMMENTS REGARDING THE TEXT OF THE DRAFT MODEL LAW

Paragraph 1 (f) of the preamble to the draft model law states that the purpose of the law is, "where legislation based on the Model Law on Cross-Border Insolvency has been enacted, to complement that legislation", and paragraph 2 of the preamble notes that the purpose of the law is not "(a) To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment" or "(b) To replace [or displace] legislation enacting the Model Law on Cross-Border Insolvency or limit the application of that legislation". In that regard, it should be noted that in 2006, Colombia adopted Act No. 1116 establishing an enterprise insolvency regime, which addresses cross-border insolvency in part III.

[...]

Thus, it is considered that the provisions of Colombian legislation that govern matters related to insolvency and the enforcement of related judgments go beyond the purposes set out in paragraph 1 of the preamble to the draft model law on the recognition and enforcement of insolvency-related judgments, which does not cover any aspects that might complement those provisions.

In respect of article 4 of the draft model law, it is recommended that the competent authorities referred to in article 89 of Act No. 1116 of 2006 should be taken into account.

3. ANALYSIS OF CONSTITUTIONALITY

The content of the preamble and the articles of the draft model law affects neither constitutional values and principles nor fundamental rights.

4. CONCLUSIONS

We note that part III of Act No. 1116 of 2006 amply and extensively captures the content of the draft model law, that text having been fully incorporated into the Colombian legal system.

5. Uruguay

[Original: Spanish]
[4 May 2018]

1. This Directorate recently received the document in which the Government of Uruguay was requested to provide comments in relation to the draft model law on the recognition and enforcement of insolvency-related judgments, which has been drafted within the framework of the United Nations Commission on International Trade Law (UNCITRAL).

2. Of the possible methods for standardizing international legislation in a given area, UNCITRAL has opted for a draft model law, which will be made available to States so that they can incorporate it into their domestic law in full or in part, in accordance with their national legislation. Other options included the creation of a treaty, agreement or convention, which would presuppose the existence of common, basic rules for the distribution of legislative and jurisdictional powers at the international level.

3. With regard to comments and concrete suggestions, we wish to provide the following information:

(a) In subparagraph 1 (d) of the preamble, it is stated that the purpose of the law is "To promote comity and cooperation between jurisdictions regarding insolvency-related judgments". With regard to that paragraph, it is suggested to delete the reference to "comity", since in modern international law it is understood that foreign law is applied or foreign judgments are recognized, where appropriate, on the basis of a legal obligation rather than a discretionary act based on "comity" towards other States in the international community. Therefore, the law should simply state "To promote cooperation between jurisdictions regarding insolvency-related judgments".

(b) Furthermore, subparagraph 2 (a) of the preamble states that the purpose of the law is not "To [replace or] displace other provisions of the law of this State with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment". Given that international insolvency or bankruptcy provisions can be found in both national and international legislation on private international law, it is suggested to adjust that wording as follows: "To [replace or] displace other provisions of the law of this State**, whether those provisions have national or international law as their source,** with respect to recognition of insolvency proceedings that would otherwise apply to an insolvency-related judgment".

(c) Article 3, paragraph 1, of the draft law states, under the heading "International obligations of this State", that: "To the extent that this Law conflicts with an obligation of this State arising out of any treaty or other form of agreement to which it is a party with one or more other States, the requirements of the treaty or agreement prevail." Given that if this draft law were adopted by a number of States at the domestic level, it would constitute private international law with national law as its source, it is clear that there is no possibility of "conflict" with treaties or other agreements (which form a part of private international law with international law as its source) because the scope of application of each is distinct (see, inter alia, art. 27 of the Vienna Convention on the Law of Treaties, and art. 1 of the Inter-American Convention on General Rules of Private International Law). The following alternative wording is therefore suggested with respect to paragraph 1 of article 3: "The provisions of this Law shall apply in the absence of a treaty or other form of agreement

to which this State is a party with a State or States whose legal systems are involved in a particular case."

(d) Article 7 refers, as is traditional, to public policy exception, stating that "Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy, including the fundamental principles of procedural fairness, of this State". In keeping with the position traditionally taken by Uruguay on the subject, as reflected in its national legislation on private international law, and in line with the declaration that Uruguay made at the time of signing the Inter-American Convention on General Rules of Private International Law (Montevideo, 1979), it is suggested to add the word "international" to the references to that exception, both in the *nomen juris* and in subsequent references, so as to reduce to a minimum the number of cases in which the exception applies, that is, limiting its application to situations in which basic rules and principles that shape the individual legal system of a particular country are violated in a concrete, serious and flagrant manner. Similarly, it is suggested to replace the reference to "procedural fairness" with the broader, more comprehensive and universal concept of "due process". Accordingly, the following wording is suggested: "International public policy exception. Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the international public policy, including the fundamental principles of due process, of this State". Alternatively, if it is not possible to include the word "international", reference should be made to "the basic principles of its public policy".

(e) Article 9, paragraph 1, states that "An insolvency-related foreign judgment [...] shall be enforced only if it is enforceable in the originating State". It would be appropriate to change "shall" to "may", since the judgment does not necessarily have to be enforced; its recognition may suffice.

(f) Article 10, paragraph 1, establishes the legal standing to apply for recognition and enforcement of an insolvency-related judgment, stating that "An insolvency representative or other person entitled under the law of the originating State to seek recognition and enforcement of an insolvency-related judgment..." shall have that legal standing. Our understanding is that such standing should be accorded both under the law of the originating State and under the law of the State where recognition and enforcement are sought, as there may be local creditors interested in initiating that process, with the effects and scope established by the law of the forum. It is therefore suggested to add text to that effect.

(g) Article 13 establishes res judicata as one of the grounds to refuse recognition and enforcement of a foreign insolvency-related judgment, both in relation to a judgment issued in the enacting State and in relation to a judgment issued in another State (paras. (c) and (d), respectively). However, the wording of those provisions differs in that paragraph (c) does not state whether the judgment issued in the State where recognition and enforcement is sought should be an earlier judgment, or whether it should relate to the same subject matter. In order to bring that wording into line with paragraph (d), it is suggested that paragraph (c) should be modified to read: "The judgment is inconsistent with an earlier judgment issued in this State in a dispute between the same parties on the same subject matter".

(h) Lastly, article 13 (g) establishes the cases in which recognition and enforcement may be refused on the basis of matters of indirect international jurisdiction, in other words, positive criteria on the basis of which a court is considered to have jurisdiction, from an international perspective, to issue a judgment with extraterritorial effects. The current draft of the model law considers valid the criterion of party autonomy, including the extension of jurisdiction (subparas. (i) and (ii)); the criterion of lex fori (i.e. jurisdiction was exercised on the same basis on which a court in the enacting State could have exercised jurisdiction (subpara. (iii))); and lastly, a criterion that is yet to be defined, as indicated by alternatives set out in square brackets: "(iv) The court exercised jurisdiction on a basis that was not [inconsistent] [incompatible] with the law of this State". In our view,

subparagraph (iv) should be replaced with a more comprehensive provision that states: "The court exercised jurisdiction in accordance with its own law", i.e. establishing a *lex causae* criterion. From a practical point of view, that wording would more clearly provide for the possibility for judgments issued by Uruguayan judges to be recognized and enforced abroad, as, in the case of Uruguay, it would be a Uruguayan law that would establish the bases for the jurisdiction of Uruguayan judges, without such provisions being subject to any arrangements that might have been agreed between the parties (which is not allowed under Uruguayan legislation) or the procedural law of the State receiving the judgment.

4. It should be noted that Uruguay has modern legislation in relation to the international insolvency regime, both with regard to aspects linked to and the law applicable to jurisdiction and in respect of the effectiveness in Uruguay of foreign judicial decisions in that area. Those provisions are contained in articles 239 to 247 of part XIII of Act No. 18.387 of 23 October 2008, which are reproduced below for ease of reference. Legislation on private international law is complemented by the provisions of the international commercial law treaties of 1889 (concluded with Bolivia, Colombia and Peru and in force) and 1940 (concluded with Argentina and Paraguay and in force).

[...]

5. Lastly, it should be noted that currently, in the context of the Hague Conference on Private International Law, a special commission has been working to prepare a draft convention on the recognition and enforcement of foreign judgments, the most recent version of which excludes from its scope of application "insolvency, composition, resolution of financial institutions, and analogous matters" (art. 2 (1) (e) of the draft convention as at November 2017).

The information provided is submitted for consideration.

6. Mexico

[Original: Spanish]
[7 May 2018]

Title of the draft law

1. The reference to "insolvency-related judgments" is erroneous because the judgments in question are judgments on insolvency cases. The same expression is used in articles 2 (d); 4; 5; 9; 10; 11 (1) (a) and (b); 11 (3); 12 (b); and 13.

Comment: In that regard, it is recommended to specify that it is a **draft law on judgments on insolvency cases**.

2. The square brackets in paragraph 2 of article 1 would usually contain information as to the situations in which the model law would not apply, such as matters that are regulated in other documents or that fall within the exclusive jurisdiction of States.

3. In article 2, on definitions, there is a problem with the definition of judgments contained in paragraph (c).

3.1. The draft law states: "'Judgment' means any decision, whatever it may be called".

3.1.2 In that paragraph, the definition refers to "any decision" and in the second sentence of the paragraph, a "decision" is defined as follows: "For the purposes of this definition, a decision includes a decree or order, and a determination of costs and expenses by the court".

3.1.3. Here it should be noted that according to the definition of "decision", a judgment does not refer to any proceeding and is limited to decrees or orders issued by a court.

3.1.4. In addition to the above limitation, the final sentence of paragraph (c) states: "An interim measure of protection is not to be considered a judgment for the purposes of this Law".

3.1.5. It is indeed correct to state that an interim measure of protection is not a judgment; however, the definition of "judgment" is undermined by its additional description as "any decision".

3.1.6. In conclusion, the provision is made unclear by the introduction of concepts that give rise to contradictions.

3.1.7. Subparagraph (d) (ii) of article 2 states: "Does not include a judgment commencing an insolvency proceeding". In the Spanish version of the text, the meaning of that paragraph is unclear unless the word "como" is added after the words "no se entenderá".

Comment: In summary, it is necessary to clarify article 2 in the light of the above-mentioned points.

4. Articles 4, 5 and 6 refer to the concept of "enacting State", a term that is incorrect. In view of the context, the words "enforcing State" should be used.

5. The final sentence of paragraph 1 of article 10 states that "The issue of recognition may also be raised as a defence or as an incidental question in the course of proceedings".

5.1. That sentence addresses two situations:

- One in which recognition is considered as a defence, and
- One in which recognition is raised as an incidental question.

5.1.1. To state that recognition is a procedural defence is completely incorrect; the legal nature of recognition involves the finding by a foreign judge that a judgment or decision is valid and their endorsement of a decision or judgment issued by another judge.

5.1.2. It is correct that recognition is an incidental question; a judgment is recognized incidentally.

6. Article 11 (b) begins with the words "(b) Granting other legal or equitable relief, as appropriate".

6.1. In the Spanish version of the text, it is recommended to modify the words "hacer lugar", which is the translation given for "granting", because the context of the article indicates that the correct wording should be "habrá lugar".

7. Article 12 (d) emphasizes that the question of recognition arises by way of defence; that is an error for the reasons given above with respect to article 10 (1).

8. Article 15 echoes the earlier reference to the granting of recognition, with the words "Se hará lugar al reconocimiento" in the Spanish text. Although the meaning is understood, the correct wording would be: "habrá lugar al reconocimiento".

Conclusions: The draft law is unclear in its definitions, certain concepts are used incorrectly, and recognition can in no way be a means of defence.

7. Mali

[Original: French]
[8 May 2018]

Comments:

Firstly, it is important to remember that unlike a uniform law, which is incorporated without modification into the domestic legal system of the States concerned, the model law provides only a framework that States can use when drawing up their draft

text. It follows that the draft model law is not a ready-to-adopt draft law. It should be analysed from that perspective.

Turning to the substance of the draft law, that is, the problem that it addresses, we have a number of reservations:

- Usually, issues regarding the enforcement of foreign judgments (which is essentially the matter at hand) are addressed either through the exequatur provisions of domestic procedural texts or through agreements on judicial cooperation or mutual legal assistance, which are fundamentally bilateral in nature. That is all the more understandable given that States do not have the same legal systems or the same judicial organizations. In Mali, exequatur is dealt with by articles 515 et seq. of the Code of Civil, Commercial and Social Procedure. The draft model law addresses insolvency, but Malian legislation is more comprehensive because it covers all foreign acts and judgments. It should be noted that, in addition to the procedure and conditions set out in articles 516 and 517 of the Code of Civil, Commercial and Social Procedure, article 518 of the Code states that judgments issued in a foreign country may be granted an exequatur only if, on the basis of reciprocity, decisions issued in Mali may be granted an exequatur in that foreign country.
- We also note that the draft model law is focused on collective proceedings. Mali is a member of a community that has passed legislation in that area: the Organization for the Harmonization of Business Law in Africa (OHADA). Those collective proceedings (discharge of liabilities, court-supervised reorganization proceedings and liquidation of assets) are comprehensively addressed in a uniform act.
- While the draft model law covers the recognition of judgments, it appears that there are substantive implications, for example, with regard to provisional relief. We believe that it would have been judicious to first elicit a response from that community, in view of the subject specifically addressed, rather than presenting the draft model law to States individually.

8. Albania

[Original: English]
[10 May 2018]

Comment (National Bankruptcy Agency):

UNCITRAL experts have to take into consideration that the creditor who has been partially satisfied in respect of its claim in a proceeding pursuant to a law relating to bankruptcy in a foreign State may not be satisfied for the same claim in a bankruptcy proceeding in another State, regarding the same debtor, so long as the satisfied amount to the other creditors of the same rank is proportionately less than the amount that the creditor has already received, without affecting in this situation, secured creditor's claims.